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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

AMENDMENT OF SECTION 73.202(b),
TABLE OF ALLOTMENTS,
FM BROADCAST STATIONS.
(Fremont and Holton, Michigan)

MM Docket No. 98-180
RM-9365

To: The Chief, Allocations Branch,
Policy and Rules Division,
Mass Media Bureau

FULLER-JEFFREY RADIO OF NEW ENGLAND, INC.'S COMMENTS

Fuller-Jeffrey Radio of New England, Inc. ("Fuller-Jeffrey"), the licensee of Class C commercial FM radio broadcasting station WPKQ, Channel 279C in Berlin, New Hampshire, by its undersigned attorney and pursuant to Section 1.420 of the Commission's Rules, hereby respectfully submits these Comments with respect to the Commission's *Notice of Proposed Rule Making* in the above-captioned proceeding, DA 98-1956, adopted on September 23, 1998 and released on October 2, 1998 by the

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Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau, 63 Fed. Reg. 54431 (published on October 9, 1998) (the "*NPRM*"). In support, Fuller-Jeffrey respectfully submits the following:

1. The instant proceeding involves a proposed amendment to the Table of Allotments for FM Broadcast Stations, Section 73.202(b) of the Commission's Rules. The proposed amendment contemplates the removal of FM radio broadcasting station Channel 261A from Fremont, Michigan to Holton, Michigan, with a concomitant modification of the license from the Commission held by Noordyk Broadcasting, Inc. ("Noordyk") for Class A FM radio broadcasting station WSHN, which operates on Channel 261A at Fremont.

2. The *NPRM* notes that WSHN commenced operation prior to the Commission's adoption of the enlarged station separation requirements for Class A FM radio broadcasting stations in 1989; that WSHN's antenna site is "short-spaced" under those requirements to the antenna sites utilized by co-channel Class A FM radio broadcasting stations WBCH, Channel 261A in Hastings, Michigan, and WZTU, Channel 261A in Bear Lake, Michigan; and that those short-spacings are "grandfathered." *Id.* at Paragraph 3. The *NPRM* recites that Noordyk intends to apply

to the Commission for a construction permit to increase the elevation of the center of radiation of WSHN's antenna, but that after the grant of the construction permit, WSHN's current (and grandfathered) short-spacing protections to WBCH and WZTU will not be lessened; and that this case therefore falls within the ambit of the Commission's policy established in *Newnan and Peachtree City, Georgia*, 7 FCC Rcd 6307 (Chief, Allocations Branch, Policy & Rules Division, Mass Media Bureau, 1992). In that case, the Commission made an exception to its normal practice of refusing to amend the Table of Allotments in a manner that would violate the spacing requirements of Section 73.207 of the Commission's Rules. The rationale of *Newnan and Peachtree City* is that since the affected station is not proposing to modify its facilities in a way that would create any new short-spacing departures from the requirements of Section 73.207, nor exacerbate the existing and grandfathered short-spacing departures from those requirements, the station should have the same opportunity to change its community of license as a station sited in compliance with Section 73.207. Paragraph 5 of the *NPRM* questions whether the Commission should continue to adhere to the policy adopted in *Newnan and Peachtree City*. *Id.* at Paragraph 5.

3. Fuller-Jeffrey notes that no basis is given for the *sua sponte* decision in the *NPRM* to revisit the policy adopted in *Newnan and Peachtree City*.

That policy has served the Commission well for six years, and Fuller-Jeffrey is not aware of any harm to the public interest that has resulted from the Commission's adherence to that policy during that time. Inasmuch as the policy only applies to situations where the affected station is not proposing to modify its transmitting facilities in a manner that would create new short-spacings or exacerbate the existing and grandfathered short-spacings, no injury is caused to any other station or to the listening public. On the contrary, the policy is wisely designed to give stations which -- through no fault of their own -- find themselves in a grandfathered departure from the spacing requirements of Section 73.207 the same flexibility as stations not so situated to serve a perceived public interest by changing their communities of license in a manner that otherwise satisfies all Commission rules and policies.

4. Fuller-Jeffrey's interest in this proceeding is to protect the vitality of the policy adopted in *Newnan and Peachtree City*. Fuller-Jeffrey is currently involved in a rule making proceeding that contemplates an amendment to the Table of Allotments by removing the allotment of Channel 279C from Berlin, New Hampshire to North Conway, New Hampshire, and a concomitant modification to Fuller-Jeffrey's license from the Commission for WPKQ. *Notice of Proposed Rule Making in MM Docket No. 97-216*, 12 FCC Rcd 16403 (Chief, Allocations Branch, Policy & Rules

Division, Mass Media Bureau, 1997). The proceeding in MM Docket No. 97-216 bears many similarities to the instant proceeding involving Fremont and Holton, Michigan: both cases involve grandfathered short-spacings in which the affected station does not propose to modify its transmitting facilities in a manner that would create new short-spacings or that would exacerbate existing and grandfathered short-spacings. ^{1/} Both proceedings should follow the policy adopted in *Newnan and Peachtree City*, unless and until someone comes forward with a sound reason not to do so, which neither the *Notice of Proposed Rule Making in MM Docket No. 97-216* nor the *NPRM* in the instant proceeding purport to do. ^{2/}

^{1/} Fuller-Jeffrey's case in MM Docket No. 97-216 involves grandfathered Class C FM radio broadcasting stations; Noordyk's case in the instant proceeding involves grandfathered Class A FM radio broadcasting stations.


^{2/} The Commission is, of course, free to change its policy. In doing so, however, it must provide a reasoned opinion or analysis of the basis for the change. *See, e.g., CBS, Inc. v. FCC*, 454 F.2d 1018, 1025 (D.C. Cir. 1971). Inasmuch as the *Notice of Proposed Rule Making in MM Docket No. 97-216* did not threaten the continuing vitality of the policy established in *Newnan and Peachtree City*, while the *NPRM* in the instant proceeding does so but without reason or analysis, the fundamental elements of rational agency decision making appear not to have been satisfied.

5. In any event, if the Commission decides to modify or to overrule the policy adopted in *Newnan and Peachtree City*, such a decision should not be applied retroactively to affect proceedings -- such as MM Docket No. 97-216 -- that were initiated and prosecuted in good-faith reliance upon the continuing vitality of that policy. Nothing in the *Notice of Proposed Rule Making in MM Docket No. 97-216*, *supra*, gave Fuller-Jeffrey or any other party notice that the policy adopted in *Newnan and Peachtree City* might be revisited; to that extent, Fuller-Jeffrey's circumstance differs from that of Noordyk in the instant proceeding, as Noordyk was at least put on notice in the *NPRM* that the policy might be overturned. It would be manifestly unfair to Fuller-Jeffrey -- whose efforts to change WPKQ's city of license date back to the filing of the original petition for rule making on April 25, 1997 by Fuller-Jeffrey Broadcasting Corporation of Greater Des Moines, Fuller-Jeffrey's predecessor as the licensee of WPKQ -- for the Commission to have proceeded so slowly in MM Docket No. 97-216 that Fuller-Jeffrey's efforts over the past 19 months now risk being undone by an action that the Commission's staff contemplates taking, *sua sponte* and without explanation, in an unrelated proceeding that was not even launched until Fuller-Jeffrey's proceeding had been pending before the Commission for one entire year from the date of the adoption of the *Notice of Proposed Rule Making in MM Docket No. 97-216*.

WHEREFORE, Fuller-Jeffrey respectfully urges the Commission to leave the policy established in *Newnan and Peachtree City* intact; or, if that policy is to be overruled, to overrule that policy only in proceedings in which the *Notice of Proposed Rule Making* had given affected parties notice that such action was being contemplated.

Respectfully submitted,

FULLER-JEFFREY RADIO OF NEW ENGLAND, INC.

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November 23, 1998

^{3/} Admitted in the State of Ohio only; supervision by John Griffith Johnson, Jr., a member of the District of Columbia Bar.


CERTIFICATE OF SERVICE

Alicia M. Altamirano, a secretary in the law firm of Paul, Hastings,
Janofsky & Walker, LLP, does hereby certify that she has on this 23rd day of
November, 1998, caused copies of the foregoing **FULLER-JEFFREY RADIO OF
NEW ENGLAND, INC.'S COMMENTS** to be mailed to the following by first-class
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